INDEX

PAGE

PETITION 1

Statement of Matters Involved 2

Questions Presented 7

Reasons for Allowance of Writ 8

BRIEF IN SUPPORT OF PETITION 11

Opinions Below 11

Jurisdiction 11

Statement of the Case 12

Specification of Assigned Errors to be Urged 12

ARGUMENT

1. The fact that petitioner assisted others in obtaining sugar for use in the illicit distillation of alcohol, coupled with the further fact that he knew of their purpose, did not render him guilty of conspiracy 12

2. The holding that the Government properly introduced evidence (other than certified proof of conviction) that petitioner was guilty of an unrelated felony, for the purpose of collateral impeachment, was contrary to established federal law 13

3. The Trial Court improperly proceeded in the presence of the jury to punish a Government witness for contempt for refusal to testify, and to permit the jury to draw an inference unfavorable to petitioner from the attendant circumstances 14

PAGE

4. The reception in evidence of telephone company toll slips and the prepared chart summarizing the calls made to and from public telephones located in petitioner's two restaurants tended to suggest his complicity in the conspiracy and was prejudicial error 15

5. Prejudicial declarations of alleged co-conspirators made after the termination of a conspiracy are inadmissible 16

6. Reasonable doubt may not be explained to a jury by inconsequential illustrations drawn from everyday affairs 16

7. The holding that the jury be required to continue its deliberations indefinitely after it had announced its inability to agree was improper 17

8. The cumulative effect of all of the foregoing errors and rulings was such as to deprive petitioner of a fair trial 18

Conclusion 18

TABLE OF CASES

	PAGE
Benton v. State (Ga. App.) 199 S. E. 561	14
Beyer v. United States (C. C. A. 3) 282 F. 225	14
Coulston v. United States (C. C. A. 10) 51 F. 178	14
Fabacher v. United States (C. C. A. 5) 20 F. 2d 736	14
Hopt v. Utah, 120 U. S. 430	16
Lile v. State (Ark.) 54 S. W. 2d 293	14
McNutt v. United States (C. C. A. 8) 267 F. 670	14
Niederluecke v. United States (C. C. A. 8) 21 F. 2d 511	14
Oras v. United States (C. C. A. 9) 67 F. 2d 463	16
Paddock v. United States (C. C. A. 9) 79 F. 2d 872	16
Parlton v. United States (Ct. of Ap. D. C.) 75 F. 2d 722	18
People v. Rubin, 286 N. Y. 56	15
People v. Van Arsdale, 242 App. Div. 545, 266 N. Y. S. 502	14
Pinn v. Commonwealth (Va.) 186 S. E. 169	14
Robilio v. United States (C. C. A. 6) 291 F. 975	15
Rowan v. State (Md.) 3 Atl. 2d 753	15
Rutherford v. United States (C. C. A. 2) 258 F. 855	14
Seeman v. United States (C. C. A. 5) 90 F. 2d 88	16
State v. Smith, 179 La. 294, 154 So. 2	14
Terry v. United States (C. C. A. 9) 7 F. 2d 28	14
United States v. Falcone, 311 U. S. 205	12
United States v. Frankel (C. C. A. 2) 65 F. 2d 285	15
United States v. Lonardo (C .C. A. 2) 67 F. 2d 883	16
United States v. Sager (C. C. A. 2) 49 F. 2d 725	14
Wissel v. United States (C. C. A. 2) 22 F. 2d 468	17

STATUTE

Judicial Code as amended, 28 U. S. C., Sec. 347:
Section 240(a) 11

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

JACOB NOVICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Jacob Novick respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on December 17, 1941, affirming a judgment of the United States District Court for the Southern District of New York, entered on May 28, 1941, convicting the petitioner of conspiracy (18 U. S. Code, Sec. 88) to defraud the United States of taxes on distilled spirits.

Statement of Matters Involved

The indictment named seventy-three defendants (R. 24-25). It proceeded to trial and verdict with respect to sixteen of them. The jury began deliberating on May 26, 1941, at 2 P. M. (R. 495). Some four hours later they returned a verdict as to fourteen defendants, finding ten guilty and four not guilty (R. 497-498). Another half hour elapsed and the jury found the fifteenth defendant guilty (R. 503). By now it was 7 P. M. and the jury went out to dinner, after which they continued their deliberations (R. 504). At 9:15 P. M. the jury reported to the Court in writing (R. 504):

> "The jury is sorry to report that it is split on Jacob Novick after long and careful discussion."

The Court directed the jury to continue considering the case as to petitioner. At 11 P. M. they were taken to a hotel for the night (R. 504-505). The next morning they resumed and deliberated into the afternoon, when at 2:35 they returned a verdict of guilty against petitioner (R. 505-510). In the course of their deliberations they had come back several times for additional instructions.

Petitioner was sentenced to twenty months' imprisonment and a fine of $5,000 (R. 511). Pending the appeal to the Circuit Court of Appeals he was admitted to bail by that Court (R. 2). The conviction was affirmed, with an opinion by Clark, Circ. J. Thereafter the Circuit Court of Appeals continued bail pending the filing of the present petition for certiorari, the United States Attorney not opposing.

A certain syndicate, including scores of individuals, was engaged in the illegal manufacture, distribution and sale of alcohol. Their activities are generally described in a four-page stipulation (R. 63-66).

Petitioner is a man of forty, and had never previously been convicted of any crime (R. 363). He was in the real

estate business and owned two restaurants in Yonkers, the Kennedy House and the Prospect Grill (R. 363-364). At the time of the alleged crime he was operating both of these simultaneously. They were four or five blocks apart (R. 365). Each establishment had a telephone booth containing a coin box telephone, available to and used by the public, but neither had any private telephone (R. 365-366). The nature of petitioner's business was such as to cause him to become widely acquainted in Yonkers. He knew many persons, some of whom were not law-abiding. He had legitimate dealings with several of the defendants, and he may have unwittingly assisted others in their illicit operations. The gravamen of the charge against petitioner is that he assisted other of the defendants, it is alleged, in obtaining sugar used in the illegal manufacture of alcohol.

I.

This brings us to a consideration of the theory of prosecution. It is perhaps best summarized by the following assertion with regard to petitioner, contained in the United States Attorney's brief in the Circuit Court of Appeals (p. 6):

> "The evidence offered by the Government touching upon the arrangements for sugar, unmistakably pointed to the appellant as the procurer of this most essential commodity in the production of alcohol. The proof shows that over $22,000 worth of sugar was utilized by these defendants."

Such participation, even if proved, does not render petitioner a party to or guilty of conspiracy.

II.

Petitioner took the witness-stand. On cross-examination he denied that he was a policy banker or in the "numbers racket" (R. 407-408). In rebuttal the prosecution called a police detective, who was permitted to testify over

objection and exception that in his opinion certain papers found on the person of petitioner showed that he was a policy banker (R. 459-460). The Government thus improperly attempted to impeach petitioner on a collateral issue.

III.

One Harrison was called as a witness by the Government (R. 191). He refused to testify (R. 191-193). The prosecutor declared that he had a statement from the witness. Whereupon in the presence of the jury the Trial Court ruled (R. 192):

> "Let the record show that Louis Harrison was called as a witness on behalf of the Government and he declines to be sworn and says he will not testify as to the matters concerning which the District Attorney interrogated him and upon which he gave a statement to the District Attorney on the 12th day of June, 1940, and he also refuses to testify as to a statement made on June 14th, 1940, and another on the 15th day of June, 1940.
>
> "In view of this refusal to be sworn and to testify by the witness Harrison, I have no other alternative but to adjudge him in contempt of court, and I commit him to the House of Detention until such time as he testifies and purges himself of this contempt."

Defense counsel attempted to prevent the jury's drawing any unfavorable inference from the foregoing proceedings, with indifferent success and a motion for a mistrial was denied (R. 192-194).

IV.

The stipulation referred to above contains the following provisions on the subject of telephone calls (R. 66):

> "IT IS STIPULATED that Government's Exhibit 173 constitutes a chart prepared by Government agents showing telephone calls made to and from the various defendants during the life of the conspiracy, and it is further

"STIPULATED that Government's Exhibit 173 insofar as it contained any records of phone calls made to or from the telephone numbers Yonkers 6631 and Yonkers 9762 was objected to by counsel for the defendant, Novick, upon the grounds that the record was not binding on the defendant and did not constitute proof of any calls made by the defendant or to the defendant, and it is further

"STIPULATED that toll slips covering each of the calls enumerated from the said two telephone numbers were offered in evidence and received in evidence over objection by counsel for the defendant, Novick, upon the same grounds as urged with respect to the offer of Government's Exhibit 173. It was conceded by defendant's counsel that the records as such were legitimate records of the New York Telephone Company with respect to the chart, the telephone contracts covering the said two numbers and the toll slips covering the calls made as represented on the chart."

An inspection of Government's Exhibit 173 (R. 516) reveals that it establishes the making of various telephone calls from the public pay stations in the Prospect Grill and the Kennedy House (both restaurants owned by petitioner) to Gallo, Matullo and Bellotti (all defendants), as well as calls to the restaurants. Exception was duly noted to the reception in evidence and the ruling was assigned as error (R. 532)—as was done in the case of the other rulings we have discussed above.

V.

A government witness, Anthony J. Sylvestri, testified that the still in Lawton Street was raided on December 23d, 1939. Over objection and exception he was then permitted to testify as to a conversation with one Milo, wherein the latter stated to the witness that petitioner "told him that something went wrong" (R. 328-331). This testimony as to a declaration of an alleged co-conspirator after the termination of the conspiracy was clearly susceptible of an incriminating construction against petitioner.

VI.

A few minutes before rendering the verdict against petitioner and after more than twenty-four hours had elapsed since the inception of their deliberations, the jury returned for the sixth time and presented the following note to the Court (R. 506):

> "The jury requests that, for further clarification, the Court explain again what constitutes reasonable doubt and the weight which should be given circumstantial evidence."

The trial Court proceeded to instruct them, inter alia, as follows (R. 507):

> "As I explained to you yesterday in the illustration that I gave you about buying goods for the fall trade, you do not know for certain what is going to happen about the war, but nevertheless you think perhaps there will be war, that prices are going up, so you buy rather heavily upon the assumption that buying now, that you will make a good profit upon the goods purchased. War may not come about at all, but you have banked your judgment and invested your money in it, and that is the conclusion you have reached by reason of the evidence that surrounds you. And so you have no reasonable doubt in that case.
>
> "Or you come out of the house in the morning and you look at the sky and it is sultry and cloudy in the west and you feel moisture in the air. Now, you are not certain it is going to rain, but nevertheless you have a reasonable doubt as to whether or not fair weather is going to continue. That is about all there is to it. When you make up your mind about anything, about your family, as to what it is going to do in the summer, or as to what provision should be made for a child, you can't be certain that what you have planned and arrangements you have made will be necessary, but nevertheless the evidence all about you indicates that what you do is the thing to do because you have no reasonable doubt about it."

The use of these trifling illustrations in the supplementary charge is assigned as error (R. 536-537).

VII.

After the jury reported in writing (R. 504):

> "The jury is sorry to report that it is split on Jacob Novick after long and careful discussion."

the trial Court nevertheless insisted that they continue deliberating. It declared, "Disagreements accomplish nothing." It reminded them of the "great deal of money" which the trial cost the government—although verdicts had already been rendered as to fifteen other defendants. The Court further indicated that the jury would be required to continue deliberating for an indefinite time, and directed that if they could not agree they should be taken to a hotel for the night (R. 504-505). Error is assigned for the failure to discharge the jury at this time (R. 535-536).

Questions Presented

I.

Did the fact that petitioner assisted others in obtaining sugar for use in the illicit distillation of alcohol render him guilty of conspiracy?

II.

Was it error for the trial Court to permit the Government to introduce evidence tending to impeach petitioner on a collateral issue and thus bring before the jury the suggestion that petitioner was guilty of another crime (a felony) unrelated to the indictment?

III.

May a trial court in the presence of the jury punish a Government witness for contempt for refusal to testify and permit the jury to draw an inference unfavorable to a defendant from the attendant circumstances?

IV.

Is it error to receive in evidence telephone company toll slips and a prepared chart summarizing calls made to and from public telephones located in two restaurants owned by a defendant and to suggest thereby his complicity in a conspiracy?

V.

Are prejudicial declarations of alleged co-conspirators, made after the termination of a conspiracy, properly receivable in evidence?

VI.

May a trial court define reasonable doubt by giving illustrations relating to the weather, business deals, vacation plans and similar relatively inconsequential matters?

VII.

When a jury reports a disagreement as to one of sixteen defendants after long and careful discussion, may the trial court require the continuation of deliberations under the circumstances presented?

VIII.

Was not the cumulative effect of all of the foregoing rulings such as to deprive petitioner of a fair trial?

Reasons for Allowance of Writ

1. The rulings below that the petitioner's alleged assistance to others in obtaining sugar for use in the illicit distillation of alcohol rendered him guilty of conspiracy, is in direct contravention of a recent holding of the Supreme Court of the United States.

2. The holding that the Government properly introduced evidence (other than certified proof of conviction) that petitioner was guilty of an unrelated felony, for the purpose of collateral impeachment, was contrary to established federal law.

3. The approval of the conduct of the trial Court in adjudging a Government witness in contempt for refusal to testify, in the presence of the jury, is at variance with previous holdings of Circuit Courts of Appeals.

4. The reception in evidence of telephone company toll slips and a prepared chart summarizing calls made to and from public telephones located in two restaurants owned by a defendant, for the purpose of suggesting thereby his complicity in a conspiracy, is clear and prejudicial error.

5. The decision that prejudicial declarations of alleged co-conspirators made after the termination of a conspiracy are admissible in evidence contravenes settled law.

6. The approval of the illustration of reasonable doubt by trivial examples is a holding at variance with the law as declared in another Circuit.

7. The holding that a jury may be required to continue its deliberations indefinitely after it has announced its inability to agree is improper.

8. The cumulative effect of all of the foregoing rulings was such as to deprive petitioner of a fair trial.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings

of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated New York, N. Y., January 6th, 1942.

JACOB NOVICK,
By JACOB W. FRIEDMAN,
Counsel for Petitioner.